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No. 76-1560

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES GYPSUM COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondents' joint brief in opposition advances two arguments why certiorari should not be granted: (1) that the question whether their exchange of price information violated the antitrust laws should not be resolved in the present case; and (2) that a number of trial errors support the decision of the court of appeals, making it unnecessary or inappropriate for the Court to reach the antitrust question.[1] Neither argument is sound.

1. Respondents' first argument, although placed under four headings (Br. in Opp. 10-17), comes down to the contention that good (or at least neutral) motive is a defense

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[1]Six respondents have filed a joint brief in opposition, to which we refer as "Br. in Opp." Respondent Watt has filed a separate brief, advancing substantially the same arguments made in the joint brief in opposition.

to an agreement among competitors to exchange current price information, even if the exchange has the effect of increasing or stabilizing prices.[2] This contention is unpersuasive for the reasons discussed in our petition, and we need not discuss it further here.

Respondents suggest (Br. in Opp. 12 n. 10) that the recent decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76-15, decided June 23, 1977, diminishes the need for the Court to decide the price information exchange issue, but the suggestion is groundless. *GTE Sylvania* held that agreements allocating territories between purchasers and sellers of the same product are not *per se* illegal. The present case does not involve a vertical agreement; it involves instead collaboration among horizontal competitors. Moreover, we have not argued that an exchange of price information is *per se* illegal; it is forbidden only if carried out with the purpose to affect prices or with an actual effect on prices.

Respondents' contention (Br. in Opp. 13-16) that the antitrust question is not properly presented, because the district court told the jury that it could "presume" intent to affect prices from actual effect, is insubstantial. The language about presumptions in the court's charge told the jury, in practical consequence, that it could find an unlawful price exchange if (a) the defendants had formed an intent to affect prices, or (b) if their deeds had such an effect. The court of appeals interpreted the instructions

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[2]Respondents contend (Br. in Opp. 9) that their activities did not affect prices. But the jury found the contrary on evidence that the court of appeals held was sufficient (Pet. App. 10a, 12a), and there is no need for this Court to scrutinize that evidentiary finding. See also the discussion of the evidence in our brief in opposition to the cross-petition in *Brown* v. *United States*, No. 76-1556. We have furnished respondents with copies of that brief in opposition.

in this manner (Pet. App. 13a n. 6; see also Pet. 15 and n. 17). The instruction may have used circuitous language, but the directions to the jury were clear: either purpose or effect was enough.[3] The court of appeals found these directions to be erroneous, and the question posed by our petition thus is properly presented by the case.[4]

Respondents also contend that it would be unfair to apply to them "retroactively" the legal principles we have discussed in our petition. This substantially restates the arguments made in the cross-petition, *Brown* v. *United States*, No. 76-1556, and we believe that respondents' arguments are incorrect for the reasons stated in our brief in opposition to that petition. It has been true for decades that exchanges of price information violate the antitrust laws if they have the effect of increasing or stabilizing prices. Respondents argue that there should be a variant of a "good faith" defense to this otherwise settled rule, but it is not a "retroactive" decision in any sense to conclude that respondents are not entitled to

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[3]The instructions were, if anything, unduly favorable to the defendants. By telling the jury that it could "presume" intent from effect upon prices, they held open the possibility that defendants could establish a defense by convincing the jury that they acted with good motives. We believe that such a defense should be unavailable and, in any event, the jury did not find that respondents had established that they acted with a good motive.

[4]Because the instructions effectively told the jury that either purpose or effect was sufficient to establish the crime, this case does not present any question about the role of "presumptions" in the criminal law. Cf. *Patterson* v. *New York*, No. 75-1851, decided June 17, 1977.

such a defense. This Court has never accepted such a defense, and it would not mark a sudden change in the law to conclude that it does not exist.[5]

2. Respondents also contend that the court should deny review because the case "would immerse this Court in myriad issues" that do not warrant review (Br. in Opp. 17). This is incorrect.

Although a "respondent may make any argument presented below that supports the judgment of the lower court" (*Hankerson* v. *North Carolina*, No. 75-6568, decided June 17, 1977, slip op. 6 n. 6), this Court has discretion not to consider issues that are not presented in the petition and would not independently warrant plenary review. See *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-227 n. 2. Respondents concede that none of the arguments they present in support of the judgment of the court of appeals has general legal importance or otherwise would warrant review here; indeed, respondents contend that review should be denied precisely because of the lack of importance of the issues they would raise.

In these circumstances the Court could and should follow its usual practice of deciding the questions presented by the petition without expressing any opinion upon other issues that may be lurking in the case. If the Court were to agree with us that the court of appeals erred on the questions we have presented, it could remand the case

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[5]Because there has not been (and we do not seek) any avulsive change in the law, *Marks* v. *United States*, No. 75-708, decided March 1, 1977, upon which respondents rely, does not assist them. See also *Dobbert* v. *Florida*, No. 76-5306, decided June 17, 1977. In our view the only "alteration" of existing law has been performed by the court of appeals, which created a defense never previously recognized by this Court.

to that court for consideration of the grounds now raised by respondents. See *United States* v. *Pomponio*, 429 U.S. 10, 13. We have acknowledged (Pet. 16-17) that this complex case might require the Court to decide some issues that would not independently call for review. The Court need not, however, be burdened by arguments that the court of appeals did not explicitly consider.

For these reasons, as well as the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.